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No. 88-5525

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RALPH B. SHIRLEY
and
SOCIETY OF SEPARATIONISTS, INC.,
.....Petitioners,

v.

JOSEPH G. SCHRAER, POSTMASTER,
UNITED STATES POSTAL SERVICE
SAN ANTONIO DIVISION, AND
ANTHONY M. FRANK, POSTMASTER GENERAL
OF THE UNITED STATES
.....Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Ralph B. Shirley, *pro se*
Member, District of Columbia Bar
7215 Cameron Road, Austin, Texas 78752
(512) 458-3342

October 5, 1988

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QUESTIONS PRESENTED

1. Where the United States Court of Appeals for the Fifth Circuit stated that "Plaintiffs appeal, contending that the issue is not moot because of the 'probability' that the Postal Service 'will certainly again be afforded an opportunity to commemorate Pope John Paul II, his successor, some other similar sectarian leader or leaders.'," and then failed to make any decision as to "some other similar sectarian leader or leaders," should the case be remanded to that court to make a decision on the question presented as stated by that court?

2. Whether Petitioners' timely-filed claims for injunctive and declaratory relief based on the Establishment and Free Exercise clauses of the First Amendment to the United States Constitution regarding the United States Postal Service's pictorial stamp cancellation commemorating the visit of Pope John Paul II to the United States in September of 1987, following the Postal Service's eight year established course of action of commemorating all visits by the Pope (once in 1979, once in 1981, twice in 1984, once in 1987), are not moot and are capable of repetition yet evading review when the Postal Service announced its 1987 plans to commemorate the Pope's visit only weeks in advance.

LIST OF ALL PARTIES

RALPH B. SHIRLEY, Petitioner and Plaintiff below.

SOCIETY OF SEPARATIONISTS, INC., Petitioner and Plaintiff below.

JOSEPH G. SCHRAER, Postmaster, United States Postal Service, San Antonio Division, and ANTHONY M. FRANK, Postmaster General of the United States, Respondents and Defendants below.

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OPINIONS BELOW

The recommendation order of the United States Magistrate suggesting to the District Court that a preliminary injunction not issue is included herewith as Appendix A and Appendix B.

The original order, and opinion of the United States District Court, Western Division of Texas, San Antonio Division denying the preliminary injunction and dismissing the action upon such recommendation are not reported but are included herewith as Appendix C and D.

The original order, opinion, and judgment of the United States District Court, Western Division of Texas, San Antonio Division dismissing the action as moot are not reported but is included herewith as Appendix E and Appendix F.

The original judgment and opinion of affirmance of the Court of Appeals for the Fifth Circuit is not reported but is included herewith as Appendix G.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 88-5525

RALPH B. SHIRLEY
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JOSEPH G. SCHRAER, POSTMASTER,
UNITED STATES POSTAL SERVICE,
SAN ANTONIO DIVISION
and
ANTHONY M. FRANK, POSTMASTER GENERAL
OF THE UNITED STATES
.....Respondents,

Petition for Writ of Certiorari to
The United States Court of Appeals
for the Fifth Circuit

Petitioners, Ralph B. Shirley and the Society of Separationists, Inc., ask that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit entered on July 8, 1988, affirming an order of the United States District Court for the Western District of Texas, San Antonio Division. The District Court dismissed as moot Petitioners'

original 42 U.S.C. §1983 action requesting injunctive and declaratory relief involving the Establishment Clause of the First Amendment to the United States Constitution. The underlying action challenges the philatelic commemoration by the United States Postal Service of the September, 1987 pastoral visit to the United States of Mr. Karol Wojtyla (a.k.a., Pope John Paul II — the potentate of the Roman Catholic Church).

Jurisdiction

The jurisdiction of this Court is invoked on the ground that the United States Court of Appeals for the Fifth Circuit has decided a question of federal law herein which conflicts with applicable decisions of this Court. Alternatively, the United States Court of Appeals for the Fifth Circuit has decided a question of federal law which has not been, but should be, settled by this Court.

The final judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 8, 1988. Jurisdiction of this Court is timely and invoked under 28 U.S.C. §2102 (c) and 28 U.S.C. §1254 (1).

Constitutional Provision Involved

The First Amendment to the Constitution of the United States provides in pertinent part as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

1

Statement of the Case

Petitioners filed their complaint in this action on August 25, 1987 in the United States District Court for the Western District of Texas, San Antonio Division. Petitioners sought injunctive and declaratory relief pertaining to the United States Postal Service's plans to commemorate the visit of Mr. Karol Wojtyla (a.k.a., Pope John Paul II — the potentate of the Roman Catholic Church) by issuing nine separate one-day pictorial cancel-

lations. The pope's visit took place between the 11th of September and the 19th of September, 1987 and the one-day cancellations by the Postal Service followed the pope in his travels to various cities throughout the United States. The action was brought pursuant to the rights and privileges accorded petitioners by the First Amendment to the United States Constitution and jurisdiction was conferred on the above mentioned District Court by 28 U.S.C. §1331 and §§2201 and 2202. The Postal Service has specially cancelled certain mail with a commemorative stamp in honor of past visits of Pope John Paul II in 1979 and 1981 and twice in 1984 (Respondents' District Court Pleadings in the instant case entitled "Defendants' Opposition to Plaintiffs' Application for Preliminary Injunction," Exhibit 1, page 9, filed Sept. 10, 1987, see Appendix H herein).

Petitioners' motion for Preliminary Injunction was denied upon the recommendation of the United States Magistrate on September 11, 1988 (see Appendix C and D). The District Court subsequently granted Respondents' motion to dismiss on the basis of mootness on January 14, 1988 (see Appendix E). The rationale of the District Court was that since the nine separate one-day philatelic offerings that the Petitioners sought to enjoin ended with the pope's departure from the United States there was no controversy between the parties and the Court could only offer an advisory opinion on the First Amendment Establishment Clause issues (Id.). The Court concluded that there was no demonstrable probability that this pope or his successor would make another trip to the United States and thus the action was moot (Id.)

The U.S. Court of Appeals, Fifth Circuit, affirmed the District Court's dismissal in a judgment filed on July 8, 1988 (see Appendix G).

Summary of Argument

1. The Fifth Circuit failed to decide on of the important questions presented in the case and which that court stated was a question to be decided. The question was whether it was a probability that the Postal Service would be afforded an opportunity to commemorate some other sectarian leader or leaders similar to the pope.

2. Petitioners' requests for injunctive and declaratory relief in their complaint is not made moot by the passing of the particular short-term event that is the gravamen of this action. Due to the demonstrable probability that the same controversy will recur involving the same complaining parties, the controversy is live and the parties are sufficiently adverse. The very same activity complained of concerning the same pope occurred once in 1979, once in 1981, and twice in 1984. Pope John Paul II is a notoriously peripatetic pope and will most certainly return to the United States several more times if he remains alive and physically able to do so. Because of the short notice given to the general public concerning the government's intention to engage in the activity complained of, as demonstrated by the notice given in the past, any action brought by Petitioners will again quickly be "mooted," as the lower courts held herein, and again evade review. This is a sly trick of the Postal Service to attempt to block review of its unlawful acts by this court. There is a "reasonable expectation" or a "demonstrated probability" and more than a speculative possibility that the United States Postal Service will again commemorate the pope (whoever that person may be) in the future whether the pope visits the United States or not. The probability of the Postal Service commemorating the visit of a religious figure in the future is not solely contingent upon a particular visit of a pope or other religious figure. The past actions are indicative of the Postal Service's inclination to commemorate any type of religious event. The Postal Service has the notoriety of a "biting dog." It has advertised religion many times in the past in various ways and will undoubtedly "bite" many more times in the future unless it is prevented from doing so. Until the issues of the First Amendment establishment clause and free exercise clause are decided the Postal Service will be free to promote religion with public funds and resources in violation of the United States Constitution.

The case is ripe for adjudication and thus, there is no reason to delay a determination of the merits.

Reasons for Granting the Writ

The Fifth Circuit should be required to decide the questions presented on appeal. The court did not decide if there was a

probability that similar sectarian leaders, other than the pope, will be commemorated by the Postal Service

The Fifth Circuit's affirmance of the dismissal of this action by the Western District of Texas conflicts with the various opinions regarding mootness issued by this Court. This action has not been mooted.

As to the Findings of Fact by the District Court, San Antonio Division, on page 17, appendix A: In paragraph two, on page 19 of this Petition, the Magistrate states that 1,500 other cancellations have been offered, "like the one in question." A cancellation has never been offered for any religious figure other than a Roman Catholic pope, according to all the evidence presented.

The statements in paragraphs 4 through 7 of the Findings of Fact on page 19 of this Petition do not improve the Defendants' position. The fact that a law violator is able to break the law without inconvenience or expense to himself or even with profit to himself would certainly be a bizarre defense unheard of in the law.

Litigation may become meaningless or merely an academic exercise and thus subject to dismissal on the basis of mootness if the matters in controversy are no longer definite and concrete or no longer touch the legal relations of the parties. The controversy must be, and continue to be, real and substantial admitting of specific relief through a decree of a conclusive character as distinguished from an opinion advising what the law should be upon a hypothetical state of facts. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-42 (1937). Cases dismissed as moot usually involve fact situations that have truly become dormant or involve interim events that have completely and irrevocably eradicated the effects of the alleged violation. See DeFunis v. Odegaard, 416 U.S. 312 (1974), (graduation from law school mooted litigation over plaintiff's admission to the school — admission would not be cancelled and diploma would not be revoked even if defendants were successful on the merits). Another classically mootable situation involves legislative action that retroactively and conclusively validates an action that was subject to litigation.

An exception to the above stated rule involves controversies that are capable of repetition yet evading review. This exception

to the rule applies to cases in which there is a demonstrable probability that the same controversy will recur involving the same complaining party. See Murphy v. Hunt, 455 U.S. 478, 482 (1982) and Hall v. Board of School Commissioners of Conecuh County, 656 F.2d 999 (5th Cir. 1981). Cases within this exception include those in which the challenged action is so short in duration that it will normally cease before review may be had. Mootness dismissal is also inappropriate in cases which involve actions that are not necessarily short term but the factual circumstances appear to make the controversy moot by the time required for appeal. Examples of the exception to the rule Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979), (court ordered exclusion of reporters from pretrial hearing), SEC v. Sloan, 436 U.S. 103 (1978), (10 day orders prohibiting stock trading) and Kinnett Dairies, Inc. v. Farrow, 580 F.2d 1260 (5th Cir. 1978), (short term performance contracts). Similarly, election contests cases such as Ely v. Klahr, 403 U.S. 108 (1971), and other fixed-date event cases such as Roe v. Wade, 410 U.S. 113 (1973), (pregnancy term), fit the exception.

The facts of the case sub judice fit rather snugly within the capable of repetition yet evading review exception. As to the probability that Respondents will repeat the action herein complained of, it is quite likely that the Postal Service will do so. Appellees will certainly again be afforded an opportunity to commemorate Pope John Paul II, his successor or some other similar sectarian religious leader or leaders. As stated in the Declaration of W. L. Davidson, Jr., paragraph 23 (initially submitted as "Exhibit 1" to Defendants' Opposition To Plaintiffs' Application For Preliminary Injunction, see Appendix H herein), the Postal Service has specially cancelled certain mail with a commemorative stamp in honor of past visits of Pope John Paul II in 1979, 1981, twice in 1984 and recently in September of 1987.

The purpose of the Postal Service, in commemorating the visit of the pope is clearly religious. The pope's visit is in no way a secular event. The last papal visit was "first and foremost a *pastoral visit* to Catholics," and the stated purpose of the visit is to "help Catholics to reaffirm their *religious identity*. . . . Archbishop John May of Saint Louis, designated speaker for the pope in the United States for the pope's visit, in *Catholic Trends*, a trade publication of the National Catholic News

Service, Vol. 18: No. 2, August 22, 1987 (a copy of the pertinent parts of Vol. 18: No. 2 is included herewith as Exhibit I). The glorification of this ecclesiastical purpose by the Postal Service does not amount to a secular legislative purpose.

It will be noted that no mention of the Vatican, or that the pope is the potentate of the Vatican, will be found on the pope's cancellation stamp. This indicates that the cancellation stamp is made for religious purposes and not for state or diplomatic reasons.

The stamp also mentions "papal visit." The defintion of "papal" in all dictionaries is: of or relating to a pope or to the Roman Catholic Church. An additional proof that the stamp and the visits are solely for religious purposes.

If the purpose of the cancellation stamp to make money for the Postal Service, greed does not make an unlawful act more worthy or less unlawful.

Considering the great pastoral and financial success of the pope's most recent visit by the Roman Catholic Church, as evidenced by the hugh throngs of fanatical devotees and the tremendous amount of media coverage, among other things, and considering the history of the pope's prior visits in October 1979, February 1981, and May and October 1984, as well as the October 1987 visit, there is a "reasonable expectation" or a "demonstrated probability" and more than a "speculative possibility" the pope will be returning. Considering the fact that the postal service stands to gain economically from commemoration of the pope and considering the history of the Postal Service's commemoration of the pope's prior visits in 1979, 1981, and twice in 1984, as well as 1987, there is a "reasonable expectation" or "demonstrated probability" and more than a "speculative possibility" that the Postal Service will again contend it as a religious event, and another lawsuit will need to be filed.

In Valley Construction Co. v. Marsh, 714 F. 2d 26 (5th Cir. 1983), the Fifth Circuit held that a dispute between the Army and non-minority contractors in determining to set aside contracts for minority firms, continued to be a live case after the eleven contracts initially involved had all been let. The Court stated that the "capability [of repetition] is obvious, and past actions by the government raise a reasonable likelihood of repetition." Additionally, the Court stressed that an appellate

court could not be expected to review the case during the short span of the underlying bidding procedures. Also in Barrett v. Roberts, 551 F.2d 662 (5th Cir 1977), the Court held that litigation regarding Aid to Families with Dependent Children procedures that allowed, under certain circumstances, tardy payment of aid funds was not mooted because of the probability that the procedures would again be used.

It should be noted that the probability or contingency of a future visit of the current pope or any successor is not determinative on the issue of whether it is probable that the Postal Service will again commemorate the pope. It does establish a pattern of conduct on the part of the Postal Service, however. The Postal Service is free to so commemorate at any time subject only to legal challenges such as the action herein. Also, it should be emphasized that there is an established pattern of the Postal Service commemorating the pope's visits.

There is a *demonstrated probability* or *reasonable expectation* that the pope will return to the United States and also that the Postal Service will authorize fancy cancellation to commemorate the event since each visit of the current pope has been commemorated by the Postal Service.

The Postal Service commemorated the pope's visit to cities in northeastern and central United States the October 1979.

The Postal Service again commemorated the pope's visit to Agana, Guam and Anchorage, Alaska, in February 1981.

The Postal Service again commemorated the pope's visit to Fairbanks, Alaska, in May 1984.

The Postal Service again commemorated the pope's visit to San Juan, Puerto Rico in October 1984.

The Postal Service again commemorated the pope's visit to cities in the southern and western parts of the United States in October, 1987.

These facts distingulish this case from mootness cases that have no established pattern of activity prior to the activity complained of. See City of Los Angeles v. Lyons, 461 U.S. 95 (1982); Murphy v. Hunt, supra, and Weinstein v. Bradford, 423 U.S. 147 (1975).

Is there no limit to the number of times an event can occur and the lower courts will continue to claim there is no probability that it will occur again?

To say that there is no probability that this will recur is absurd.

To make it even more likely that the Posdtal Service will again violate the U.S. Constitution it can commemorate any successor of the pope or any other religious leader or leaders.

As to evading review portion of the exception to the mootness rule: Respondents have argued that court-ordered relief is mooted merely by the fact that the particular occurrence complained of in this action has fully run its course and thus the controversy regarding such is no longer live. It is true that the 1987 visit of Pope John Paul II has ended and there is no possibility that this Court could grant Petitioners the specific injunctive relief requested by the Petitioners in this action pertaining to that visit of that pope (i.e., the preliminary injunction issue regarding the September, 1987 papal visit is moot). There is however a continuing controversy between the parties concerning future visits of Pope John Paul II, or any pope or other religious figure, which the U.S. Postal Service would desire to commemorate by specially fancy-cancelling certain first class mail. Further, as noted above, the Postal Service is not constrained to commemorate particular religious leaders only upon visits to the United States. Thus, the additional relief requested in Plaintiffs' Complaint based on the merits of the action (e.g., declaratory relief), has not been mooted. There is nothing less than or something greater than a demonstrated probability that the issues will arise again.

In the past, the pope has announced his anticipated visits to the United States only several months before the actual visit. The Postal Service then advertises the special cancellation of certain mail, primarily to philatelists, several weeks after the pope's announcement. This allows concerned citizens only a matter of weeks to seek relief in federal court to contest the cancellations. What is very improbable is that a lower court would grant an injuinction against the Postal Service. To be fully litigated the case *must* go to the Supreme Court of the United States. This is a classic example of a dispute that is capable of repetition yet evading review.

Moreover, construing the totality of Appellees documents on file herein, the Postal Service will commemorate future papal visits in the same manner as here in dispute. The underlying issues in this action are thus certainly far from dead.

In County of Los Angeles v. Davis, 440 U.S. 625 (1979), the Supreme Court stated the general rule that a case is not mooted by the mere voluntary cessation of allegedly illegal conduct subject to litigation, as Appellees seem to be claiming. Appellees only ceased using the special first class cancellations complained of herein because the particular event commemorated has come and gone. Appellees have in no way suggested their actions will not recur upon the next visit of Pope John Paul II, any other pope or any other similar religious event. Petitioners continue to maintain that such past and ongoing activity is abhorrent to the United States Constitution (the First Amendment's Establishment and Free Exercise clauses), thus demonstrating that the controversy is still quite alive. The action sub judice is more like Hall v. Board of School Commrs., supra, where the defendants vigorously asserted the validity of a religion/theology course in a primary school and had not intimated any intention to cease offering it in the future. The Court held that the course was likely to be repeated and thus judicial economy compelled that the merits be reached. See also U.S. v. New York Tel. Co., 434 U.S. 159 (1977), (orders authorizing short-term surveillance held likely to recur without judicial determination of constitutionality).

It is also to be noted that Respondents have the burden of demonstrating mootness in this action, and that burden is a heavy one. See U.S. v. W. T. Grant, Co., 345 U.S. 629, 632-33 (1953). Also, as noted in Hall V. Board, supra at 1001, Respondents must offer more than their mere declaration that the conduct has ceased and will not be revived: there must be no reasonable likelihood that the activity will recur. Again, the Defendants herein have maintained that their actions are constitutional and they could thus be expected to continue the activity in the future. It could hardly be said that Respondents have proved that the commemoration complained of will not again occur in the future.

If the pope had never visited cities in the United States there would be a physical or theoretical possibility that he could do so, and the Respondents' argument might have some logic to it, but since he has done so many times and the Postal Service has authorizaed fancy cancelling every tiem, there is a demonstrated probability and reasonable expectation that both the

visits and the postal cancellations will be repeated as usual.

It is also to be noted that when important and fundamental constitutional rights are involved, the public interest in deciding those issues also helps to prevent the case from being moot. Roe v. Wade, supra, and Wirtz v. Glass Blowers Local 153, 389 U.S. 463, 474 (1968). In Roe v. Wade, supra at 125, the Supreme Court stated that if child-birth makes a case regarding pregnancy moot then such litigation "would seldom survive much beyond the trial stage, and appellate review will be effectively denied." The Court held that even though it was not certain that any one of the plaintiffs therein would become pregnant again, the law of mootness "should not be so rigid."

This court has remanded cases to Federal Courts of Appeal where one question presented was not decided by the Appeals Court. Barr v. Matteo, 355 U.S. 171, Alaska v. American Can Co., 358 U.S. 224, (1959), and Papasan v. Allain, 106 S.Ct. 2932 (1987).

Important and fundamental constitutional rights are involved in this action. Furthermore, judicial economy seems to dictate that this action not be dismissed.

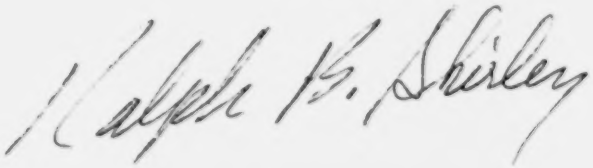
CONCLUSION

This action is not an appropriate one for the application of the mootness doctrine. The Postal Service will commemorate the pope, either the present pope or another elected pontiff or other notable religious figure, by specially fancy-cancelling certain first class mail as it did in 1979, 1981, twice in 1984 and recently in September of 1987. As shown from the evidence herein, this is the type of case that is capable, and almost certain, of repetition and, unless this Court hears the action, the issues could forever evade review. Also the Postal Service could inappropriately commemorate the religious figure whether or not there is any actual visit to the United States: the complained of action could occur at any time. This challenged action is always too short in duration to be fully litigated prior to its termination. Petitioners are ready and eager to proceed with this action and will vigorously do so as the controversy is substantive and persistent.

For the foregoing reasons a Writ of Certiorari should issue to review the judgment of the District Court for the Western

District of Texas and the judgment of affirmance of the Court of Appeal for the Fifth Circuit.

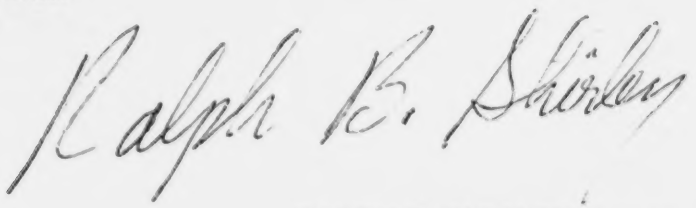
Respectfully Submitted,



RALPH B. SHIRLEY, *pro se*
Member, District of Columbia Bar
7215 Cameron Road
Austin, Texas 78752
(512) 458-3342

Certificate of Service

I, Ralph B. Shirley, hereby certify that I have mailed three copies of the foregoing Petition for Writ Of Certiorari to (1) Solicitor General, Department of Justice, Washington, D.C. 20530; (2) Mr. Robert S. Greenspan, Assistant United States Attorney, Appellate Staff, Civil Division, Room 3617, Department of Justice, Washington, D.C. 20530; (3) Mr. Joseph G. Schraer, Postmaster, San Antonio Division, U.S. Postal Service, 655 E. Durango, Suite 613, San Antonio, Texas 78206; (4) Mr. Anthony M. Frank, Postmaster General of the United States, 475 L'Enfant Plaza, S.W., Washington, D.C. 20260, in duly addressed envelopes, with postage prepaid, on or before October 5, 1988.



October 5, 1988

RALPH B. SHIRLEY, *pro se*
Member, District of Columbia Bar
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(512) 458-3342

Appendices

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Appendix A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RALPH B. SHIRLEY, and SOCIETY OF SEPARATIONISTS, INC., SA-87-CA-1080

v.

JOSEPH G. SCHRAER, ET AL

MEMORANDUM AND RECOMMENDATION
10 September 1987

TO: Honorable H. F. Garcia
United States District Judge

The following findings and recommendations are submitted to the Court pursuant to Title 28 U.S.C. §636(b)(1)(B) and Local Court Rules 1(d)(1)(A) and 4(b). The matter before the Court is Plaintiff's motion for preliminary and permanent injunctive relief, filed August 25, 1987 (Plaintiffs' Original Complaint at page 4).

STATEMENT OF THE CASE

On August 25, 1987, Plaintiffs filed their Original Complaint against Joseph Schraer, Postmaster, United States Postal Service, San Antonio Division, and Preston Tisch, Postmaster General of the United States. By their Complaint Plaintiffs allege that Defendants' intended implementation of a program of "fancy cancelling", whereby first class letters and postcards would be stamped with the Vatican City "crest" in commemoration of Pope John Paul's visit to San Antonio, promotes religion with public funds in violation of the Establishment Clause of the 1st Amendment to the U.S. Constitution. Additionally, Plaintiffs claim that Defendants' acts will adversely effect the dis-

patch and receipt of mail by Plaintiffs at the San Antonio Post Office during the day in question.

On September 2, 1987, the District Court referred this cause to the undersigned Magistrate for the purpose of conducting a hearing and making recommendations regarding Plaintiffs' request for preliminary injunctive relief. Pursuant to the District Court's Order of Referral, the matter was scheduled to be heard on September 9, 1987 at 2:00 P.M. (Court Order filed September 4, 1987). Due to attorney scheduling conflicts, however, said hearing was rescheduled by agreement of the parties for September 11, 1987 at 11:00 A.M. (Court Order filed September 8, 1987). Ultimately, no hearing was covened inasmuch as both parties waived oral arguments and instead, chose to rely upon their written pleadings and affidavits. On September 10, 1987, Plaintiffs filed their Brief In Support of Preliminary Injunction and Defendants filed their Opposition to Plaintiffs' Application for Preliminary Injunction.[1]

FINDINGS OF FACT

1. The Postal Service announced plans to offer one-day pictorial philatelic cancellations in 9 cities (including San Antonio, Texas) in connection with the U.S. visit of Pope John Paul II in philatelic Release No. 46, issued on July 29, 1987. Upon request, an individual may have postcards and first class letters hand cancelled with a special rubber stamp bearing the Vatican City state emblem, at specific postal facilities on the day of the Pope's visit to that city. In San Antonio, the commemorative cancellation will be offered on Sunday, September 13, 1987.

2. Such philatelic cancellations are a routine part of postal service operations. During 1986, approximately 1,500 pictorial cancellations, like the one in question, were offered by the postal service. Forty-five of these were offered within the Postal Field Division that includes San Antonio, with 16 such offerings in San Antonio alone.

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[1]No answer or other responsive pleadings or papers have been filed by Defendants to date and in fact, none are due insofar as Defendants' 60-day Answer date does not run until 10/28/87.

3. In San Antonio, the main post office on Perrin-Beitel will be the only postal facility handling the Pope John Paul II cancellation.

4. On September 13, 1987, the main postal facility's regular work force of approximately 400 employees will be processing mail during regular work hours. On an average Sunday, the main post office processes approximately 2.4 million pieces of mail.

5. Defendant Joseph Schraer, Postmaster, San Antonio, Texas, estimates that only 10,000 Pope John Paul II pictorial cancellations will be processsed on the day in question, or only 1/10 of 1% of the day's usual total postal business.

6. No additional net costs are incurred by the Postal Service in offering such philatelic cancellation; in fact, the Postal Service usually derives a net economic benefit from such offerings.

According to W. L. Davidson, Jr. Director of Office of Stamp and Philatelic Marketing, Philatelic Affair's Dept., the Postal Service realized a net profit of approximately $136 million from the sale of philatelic products including philatelic postmarking. Before a philatelic cancellation is issued a determination is made as to its economic viability. While the Postal Service makes a profit on its pictorial philatelic cancellations as a whole, some philatelic postmarks are determined to be economically viable even though the costs of offering them somewhat exceeds revenues, due to the goodwill and good public relations the Postal Service stand to gain.[2]

7. All philatelic cancellations are handled separately from and without disturbing ordinary mail processing. DMM §164.21. For the same reason, such cancellation offering is limited to requests of fewer than 50 envelopes unless advance approval is obtained for larger requests. *Id.* This is especially the case in San Antonio, since no hand back cancellations will be offered due to the fact that window service is normally and will be unavailable inasmuch as the Pope's visit to San Antonio (the only day such cancellation is available) falls on a Sunday. *See* DMM §164.23a.

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[2]There is no evidence that the instant cancellation will not financially benefit the Postal Service.

CONCLUSIONS OF LAW

1. Preliminary injunctive relief is inappropriate unless Plaintiff can establish: (1) a substantial likelihood that Plaintiff will ultimately succeed on the merits; (2) irreparable harm if the injunction is not issued; (3) the threatened harm to Plaintiff outweighs any potential injury the injunction may cause Defendants; and (4) the injunction will not disserve the public interest. *See* Lindsay v. City of San Antonio, 821 F.2d 1103, 1105-7 (5th Cir. 1987).

2. To determine whether Defendants' acts (i.e., causing and allowing the "Visit of Pope John Paul II" pictorial cancellations) violate the Establishment and Free Exercise Clauses of the First Amendment, this Court must inquire: (1) whether the challenged conduct has a secular purpose, (2) whether the primary effect of the challenged conduct serves to advance or inhibit religion, and (3) whether the challenged conduct creates an excessive entanglement of government with religion. *See* Lynch v. Donnelly, 465 U.S. 668, 679 (1983) (creche as part of city's annual Christmas display in downtown park held not to endorse or promulgate Christian beliefs in violation of First Amendment). Accord, Protestants and Other Americans United for Separation of Church & State v. O'Brien, 272 F.Supp. 712, 718-21 (D.D.C. 1967) (issuance of postage stamp bearing Hans Memlings painting of "Madonna and Child with Angels" held not violative of First Amendment).

3. The purpose of the "Visit of Pope John Paul II" commemorative cancellation is clearly secular; i.e., the promotion of philately.

4. The Congress of the U.S., in establishing the for-profit, independent entity of the Postal Service, specifically empowered the Service "to provide philatelic services." *See* 39 U.S.C. §404(a)(5).

5. Further, regulations dictate the subject matter of pictorial cancellations such as the one at issue. Domestic Mail Manual (DMM) §164.9 et seq. Pursuant to such regulation, a cancellation must be issued in connection with a particular "exhibition or event" and the cancellation must bear the name of the

exhibition or event. DMM §164.92. Additionally, "cancellations that endorse the ideals, policies, [etc.] of religious, anti-religious, . . . or special interest organizations will not be approved. However, cancellations . . . that recognize events . . . sponsored by or involving such organizations, providing their designs do not include works, symbols, or illustrations referring to [such] ideals, policies, [etc. may be approved]." *Id.*

6. The principle or primary effect of the offering of the "Visit of Pope John Paul II" commemorative cancellation is not the "advancement" or "inhibition" of Roman Catholicism or Christianity; it is the recognition and commemoration of the visit by a world leader and head of state, an event of widespread national interest.

7. Finally, there is no "excessive entanglement" of government and religion created by the issuance of the "Visit of Pope John Paul II" commemorative cancellation inasmuch as the routine handling of mail will not be impeded nor will said cancellation cause any net increased cost.

8. Inasmuch as the "Visit of Pope John Paul II" commemorative cancellation offering by the postal service cannot be said to "establish a religious faith or tend to do so," when considered in light of the foregoing factors, Plaintiff cannot establish a substantial likelihood of success on the merits and must therefore be denied injunctive relief. See Lindsay, *supra*, 821 F.2d at 1111 (denying injunctive relief on singular ground that Plaintiffs failed to demonstrate substantial likelihood of success on merits).

RECOMMENDATION

Based upon the preceding findings of fact and conclusions of law the undersigned respectfully recommends that Plaintiffs' motion for preliminary injunctive relief be in all things DENIED.

SIGNED and ENTERED this 10th day of SEPTEMBER, 1987.

JAMIE C. BOYD
United States Magistrate

Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RALPH B. SHIRLEY, and
SOCIETY OF SEPARATIONISTS, INC.,

SA-87-CA-1080

v.

JOSEPH G. SCHRAER, ET AL

ORDER CONCERNING SERVICE AND NOTICE OF RIGHT TO OBJECT/APPEAL
September 10, 1987

The United States District Clerk shall serve a copy of this United States Magistrate's Memorandum and Recommendation on all parties by mailing a copy to each of them by Certified Mail, Return Receipt Requested. Pursuant to 28 U.S.C. †636(b)(1) (Supp.1982), and Rule 4(b) of the Local Rules for the Assignment of Duties to United States Magistrates, any party who desires to object to this report must file written objections to the Memorandum and Recommendation within ten (10) days after being served with a copy. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report shall bar the party from a *de novo* determination by the District Court of those proposed findings and recommendations. *See generally* United States v. Raddatz, 477 U.S. 667, 673-676, 683 (1980); 28 U.S.C. †636(b)(1) (Supp.1982). Additionally, *any failure to file written objections to the proposed findings and recommendations contained in this Memorandum and Recommendation, within ten (10) days after being served with a copy, shall bar the aggrieved party from appealing the factual findings of the Magistrate that are*

accepted of adopted by the District Court, unless the party validly alleges grounds of plaint error or manifest injustice. See Deloney v. Estelle, 679 F.2d 372, 373 (5th Cir. 1982); Nettles v. Wainwright, 677 F.2d 404, 408-410 (5th Cir. 1982) (Unit B *en banc.*).

SIGNED and ENTERED this 10th day of September 1987.

JAMIE C. BOYD
United States Magistrate

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
FOR THE SAN ANTONIO DIVISION

RALPH B. SHIRLEY, and
SOCIETY OF SEPARATIONISTS, INC.,

SA-87-CA-1080

Plaintiffs

v.

JOSEPH G. SCHRAER, ET AL

Defendants

ORDER
11 September 1987

On this day came on to be considered the Memorandum and Recommendation of United States Magistrate Jamie C. Boyd, recommending that plaintiffs' motion for preliminary injunctive relief be DENIED. Plaintiffs', though advised of the necessity of objecting to the recommendation by today, have not filed any objections. Having reviewed the pleadings, the affidavits, and the recommendation, the Court is of the opinion the recommendation should be adopted.

It is, therefore, ORDERED that plaintiffs' request for preliminary injunctive relief be, and it hereby is, DENIED.

SIGNED this 11th day of September, 1987.

H. F. GARCIA
UNITED STATES DISTRICT JUDGE

Appendix D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RALPH B. SHIRLEY, and SOCIETY OF SEPARATIONISTS, INC., — SA-87-CA-1080

Plaintiffs,

v.

JOSEPH G. SCHRAER, et al.

Defendants,

ORDER
11 September 1987

This matter came on to be heard on September 11, 1987 on the application of Plaintiffs Ralph B. Shirley and Society of Separationists, Inc. for preliminary injunctive relief, and having heard the evidence presented and the arguments of counsel, and having read the submissions of the parties, this Court is of the opinion that Plaintiffs have failed to satisfy the prerequisites for entry of preliminary injunctive relief. *See* Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987); *see also* Lynch v. Donnelly, 465 U.S. 668 (1983). Accordingly, it is this day ORDERED that Plaintiffs' application for preliminary injunctive relief be, and hereby is, DENIED.

This the ___ day of September, 1987, in San Antonio, Texas.

H. F. GARCIA
United States District Judge

Appendix E

UNITED STATES DISTRICT COURT
IN THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RALPH B. SHIRLEY, et al — SA-87-CA-1080
Plaintiffs,

v.

JOSEPH G. SCHRAER, Postmaster,
United States Postal Service,
San Antonio Division, et al

Defendants.

ORDER OF DISMISSAL
14 January 1988

On this day came on to be considered the motion of defendants to dismiss based upon mootness. Plaintiffs instituted this lawsuit for a declaratory judgment that the use by defendants of a cancellation stamp commemorating the visit of Pope John Paul II to the United States in September, 1987 violated the Establishment Clause and Free Exercise Clause of the First Amendment. Plaintiffs also sought an injunction to restrain the use of the cancellation stamp. Their request for a preliminary injunction was denied. Plaintiffs claim the issue is not moot because defendants have used a cancellation stamp on occasions in the past to commemorate the Pope's visits to the United States and is likely to do so again in the future.

In general a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. Murphy v. Hunt, 455 U.S. 478, 481, 102 S.Ct. 1181, 1183, 71 L.Ed. 2d 353 (1982). An exception has been recognized in cases that are capable of repetition, yet evading review. *Id.* at 482, 102 S.Ct. at 1183. This exception applies if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. *Ibid.* Mere physical or theoretical possibility is not sufficient. *Ibid.* Rather, there must

be a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party. *Id.* at 482, 102 S.Ct. at 1184.

Utilizing these standards the Court believes this case is moot. The cancellation stamp commemorated the visit of Pope John Paul II in September, 1987. It was developed for that one event and is no longer in use. The Court does not believe this case fits within the exception to the general rule. At this point, another visit by Pope John Paul II is only a possibility. There are no plans for another visit here by this Pope, thus certainly no demonstrated probability of another trip. Expectation of another visit by this Pope is not reasonable. Numerous events could transpire hereafter which could affect such a possibility. It is purely conjecture to expect a future visit based upon past action. A ruling on the constitutionality of the cancellation stamp would be a mere advisory opinion which may never have legal consequences. No actual case or controversy exists.

It is therefore, ORDERED that defendant's motion to dismiss is GRANTED.

Signed this 14th day of January, 1988.

H. F. GARCIA
UNITED STATES DISTRICT JUDGE

Appendix F

UNITED STATES DISTRICT COURT
IN THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RALPH B. SHIRLEY, et al
SOCIETY OF SEPARATIONISTS, INC.,

SA-87-CA-1080

Plaintiffs,

v.

JOSEPH G. SCHRAER, Postmaster,
United States Postal Service,
San Antonio Division, et al

Defendants.

JUDGMENT
14 January 1988

In accordance with the Order of Dismissal being entered contemporaneously herewith;

It is ORDERED that the above-entitled and numbered cause be, and it hereby is, DISMISSED without prejudice.

SIGNED this 14th day of January, 1988.

H. F. GARCIA
UNITED STATES DISTRICT JUDGE

Appendix G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-5525

Summary Calendar

RALPH B. SHIRLEY, and
SOCIETY OF SEPARATIONISTS, INC.,
Plaintiffs-Appellants,

versus

JOSEPH G. SCHRAER, Postmaster,
United States Postal Service,
San Antonio Division, ET AL.
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

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8 July 1988

Before GEE, REAVLEY, and KING, Circuit Judges.

BY THE COURT:

Pope John Paul II visited nine cities in the United States during the period September 10-19, 1987. The U.S. Postal Service offered a pictorial hand cancellation to commemorate the Pope's visit. The special cancellations were to be done at designated postal stations in each of the nine cities on the date of the papal visit to each city. The plan to offer this special service was announced in the Postal Service's "Stamp News USA," philatelic release no. 46, July 29, 1987. San Antonio is one of the nine cities.

Ralph Shirley and the Society of Separationists, Inc., filed suit on August 25, 1987, against the Postmaster of San Antonio and the U.S. Postmaster General for declaratory and injunctive relief. Quoting Thomas Jefferson, the plaintiffs' complaint alleged that Postal Service's plan breaks the "wall of separation between church and state." It alleged that the Postal Service is supporting Roman Catholicism in violation of the First Amendment.

The district court, finding that the Pope's visit to San Antonio on September 13, 1987, would generate an estimated 10,000 pictorial cancellations commemorating the event, only one-tenth of one percent of the mail to be processed that day in San Antonio, denied a preliminary injunction.

The Vatican visitor came and went, and the Postal Service moved to dismiss the suit as moot. On January 14, 1988, the district court granted the motion to dismiss, determining that the issue was moot.

Plaintiffs appeal, contending that the issue is not moot because of the "probability" that the Postal Service "will certainly again be afforded an opportunity to commemorate Pope John Paul II, his successor or some other similar sectarian leader or leaders." The appellants allege that the Postal Service has honored the Pope with commemorative cancellations in 1979, 1981, twice in 1984, and in September 1987.

> Considering the great pastoral and financial success of the Pope's most recent visit and the positive media exposure of the internal operations of the Roman Catholic Church, the Pope will be returning. The Postal Service will again commemorate the visit, which Plaintiffs will again contend is as a religious event, and another lawsuit will need to be filed.
>
> Appellants' brief, 4.

Because the Pope's 1987 visit is history and no other visits are planned, the appellants can escape mootness only by showing that the Postal Service's action is "'capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S. Ct. 279, 55 L.Ed. 310 (1911); DeFunis v.

Odegaard, 416 U.S. 312, 318-19, 94 S. Ct. 1704, 40 L.ED.2d 164 (1974). "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." Roe v. Wade, 410 U.S. 113, 125, 93 S.Ct. 705, 35 L.2d 147 (1973).

For a case to fall within the category described by Southern Pacific, two requirements must be met: (1) the duration of the challenged action must be too short to allow full litigation; and (2) a reasonable expectation must exist that the same party will be subjected to the same action again. Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975). There must be a "demonstrated probability" that the same controversy will recur. *Id.* Mere physical or theoretical possibility is insufficient to satisfy the Weinstein test. Murphy v. Hunt, 455 U.S. 478, 482, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982).

Appellants have not established a "demonstrated probability" or a "reasonable expectation" that the current pope or his successor will visit the U.S. and that the Postal Service will commemorate the event with special cancellations. Appellants have shown no more than a speculative possibility of such occurrences. The district court was correct in dismissing the case as moot, and its judgment is AFFIRMED.

Appendix H
Defendant's Opposition to Plaintiffs' Application for Preliminary Injunction
Exhibit 1, page 9, filed September 10, 1987

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

RECEIVED
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RALPH B. SHIRLEY and SOCIETY OF SEPARATIONISTS, INC.,

Plaintiffs,

V.

CIVIL NO. SA-87-CA-1080

JOSEPH G. SCHRAER, et al.,

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

Defendants Joseph G. Schraer, Postmaster, San Antonio, Texas and Preston R. Tisch, Postmaster General, U.S. Postal Service, by and through their undersigned counsel, to assist the Court in its consideration of Plaintiffs' application for preliminary injunctive relief, hereby respectfully submit the following brief "Opposition."

EXHIBIT 1.

DECLARATION OF W. L. DAVIDSON, JR.

I, W. L. DAVIDSON, Jr., under penalty of perjury, declare:

1. I am employed by the United States Postal Service, at Postal Service Headquarters in Washington, D.C. 20260, as the Office of Stamps & Philatelic Marketing, Philatelic Affairs Department. As Director I am responsible for the selection of subjects and designs for stamps and pictorial postage cancellations, for the production and distribution of stamps, for public relations activities related to stamps and stamp collecting, for the marketing, advertising, and sale of philatelic products, and for the development of stamp related products for sale to collectors. I have been employed in the Office of Stamps & Philatelic Marketing for the past eight years and have become thoroughly familiar with all of these functions.

23. A similar philatelic cancellation was offered in nine cities visited by Pope John Paul II in 1979 (See Philatelic Release No.63, Exhibit C). Sixty thousand cancellations were requested by mail order alone and thousands more were requested through "hand back" service. Another cancellation was offered in Agana, Guam, and Anchorage, Alaska, in connection with Pope John Paul II's visits to those cities in February 1981. One was offered in connection with Pope John Paul's visit to Fairbanks, Alaska, in May 1984. Another pictorial cancellation was offered in San Juan, Puerto Rico, in connection with Pope John Paul II's visit to that city in October 1984.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct.

W. L. Davidson, Jr.

Appendix I
Excerpt form *Catholic Trends* journal
Vol. 18, No. 2, 22 August 1987

catholic trends

a publication of the national catholic news service

The two lay experts who will serve the U.S. bishops' October 1987 Synod of Bishops | Vol. 18: No. 2

Aug. 22, 1987

Arduous processes are involved in the development of collaboration within the church. But those processes are seen as worthwhile when they are motivated by a desire to serve and care for some segment of human need, Dolores Leckey said in an address in Pittsburgh to the convention of the Conference of Major Superiors of Men. She is executive director of the U.S. bishops' laity committee. "Collaboration for some thing, for some good, enriches all of us," she said. "When we are trying to be obedient to God to care about the earth, for example, or to care for various dimensions of human life or to care for unity in the human family, then we have reason to go through the often arduous processes associated with collaboration." Leckey said there was a sense among U.S. lay people consulted in connection with the upcoming world Synod of Bishops on the laity that collaboration among priests, religious, laity and others is important not only for all the personal conversion "it inevitably engenders, but important to carry on the mission of Christ and Christ's church."

The pope's trip to the United States is "first and foremost a pastoral visit to Catholics," said Archbishop John May of St. Louis, president of the National Conference of Catholic Bishops, at an August media briefing. The papal visit will help Catholics to "reaffirm their religious identity" at a time when "there is a certain amount of confusion in the minds of quite a few good, sincere Catholics over just what it means to be a Catholic — to believe like a Catholic and to live like a Catholic — in a wealthy, consumerist, nuclear-armed, secularized country like this one," May said.

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